IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 259 OF 2010

BETWEEN

AGA KHAN HEALTH SERVICES KENYA ..... APPELLANT

AND

MARGARET NJOKI NJUNG'E AND

ESTHER MWAURA ..... 1ST RESPONDENT

DR. OUMA OBURA ..... 2ND RESPONDENT

JARED MONIZ ..... 3RD RESPONDENT

(Appeal form the Ruling and Order of the High Court of Kenya at Nairobi (R.N. Nambuye, J.) delivered on 18th day of July, 2008

in

CIVIL CASE NO. 1596 OF 2008)

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JUDGMENT OF THE COURT

[1] This is an appeal from the ruling and order of the High Court of Kenya at Nairobi dated 18th day of July 2011 by Nambuye J., (as she then was). A brief background is necessary so as to put this judgment in proper perspective.

Margret Njoki Njunge and Esther Mwaura, the 1st and 2nd respondents respectively, herein referred to as deceased family filed suit before the High Court Nairobi against the Aga Khan Health Services Kenya, (appellant hospital), Dr. Ouma Obura and Dr. Gerald Moniz, the 3rd and 4th respondents respectively. Margret and Ester's claim was brought on behalf of the estate of the late Charles Njunge Mwaura who died on 8th August 1997. It is alleged the deceased, who was otherwise healthy person was admitted at Aga Khan Hospital Nairobi on 17th July 1997, under the care of Drs, Obura and Moniz for an operation to remove a tumour in his vocal cords believed to be a haemongonia. The deceased was operated the following day, that is, to say, the 18th July 1995. During the operation, the deceased suffered a reduction

of oxygen in his blood which led to flooding of blood in the lungs thereby causing him to suffer an irreversible brain damage.

[2] The deceased thereafter became unconscious and was bedridden and remained under nursing care until he finally died on 8th August 1997. The hospital and the two doctors who performed the operation were sued for negligence as particularized in the pleadings. The family of the deceased also prayed for damages for pain, suffering and loss of earning capacity, loss of consortium and distress suffered by the widow; damages under the Fatal Accidents Act and under the Law Reform Act, and under any other enabling provision of the law. The deceased's estate also sought a declaratory order that it was not bound to pay charges, expenses and hospital accommodation bills raised by Aga Khan hospital for services rendered to the deceased.

[3] As would naturally be expected, the appellant filed a very elaborate statement of defence. The appellant admitted the deceased was admitted at the hospital on the 17th July 1995, as a private patient under the care of Drs. Obura and Moniz. All allegations of negligence, breach of duty of care, insufficient nursing care or lack of attention were denied in toto. The hospital pleaded that, if the deceased's death was caused by the alleged acts of omission by the hospital or its agents, the same was caused by the negligence or contributory negligence of the Dr, Obura and Dr. Moniz.

[4] Both doctors filed their statement of defence denying liability in the suit by the deceased family and a reply to the appellant's statement of claim against them. It is admitted the deceased was admitted in the hospital and he died. It is alleged by the doctors it was the hospital that had the absolute control over the supply, selection and ordering of equipment used in its theatre. The doctors claimed they could only use the cuffed endotracheal tubes that were provided by the hospital while DR. Obura operated the deceased and Dr Moniz an anaesthetist did not use any operating instruments.

[5] After the pleadings closed, Dr. Obura filed a Notice of Motion on 27th August 2007, under **Order X Rule 13, 14, 16, 20** & **23** of the Civil Procedure Rules seeking orders against the appellant to produce in court the entire file containing the surgeons notes, the anaesthetics notes, the nurse's notes and the post-mortem report relating to the admission, treatment, care and death of the deceased before the commencement of the trial. The second order was upon production of the documents, Dr. Obura be allowed to authenticate his surgeon's notes in the said file and be at liberty to copy the said file. Lastly in default of producing the said file by the hospital upon the order being given, the hospitals defence to the claim by the deceased family and its defence to his defence be struck out.

[6] The aforementioned application that was heard and determined by Nambuye J., in the ruling of 28th September 2007. The entire application was allowed in the following terms;

> **(2) "In view of the nature of the content of the information contained in the said documents the court makes an order that the said contents at all times are accessed by the parties to these proceedings and their respective counsel only**
>
> **(3) All the counsel appearing for the parties herein to file an undertaking on their own behalf and that of their clients within 14 days from the date of the receipt of the said documents to the effect that the information accessed will be used solely for the proceedings herein and that care will be taken to ensure that it does not land into the hands of an authorized persons.**
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> **(4) Condition no. 2 and 3 above will not in any way hinder the adduction of evidence and cross examination on the same during the proceedings in court**
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> **(5) Item No. 1 above (order No 1) to be complied with within 30 days from the date of the reading of this ruling.**
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> **(6) The applicant will have costs of the application paid by the first defendant."**

[7] There are exchanges of correspondence between counsel for the appellant and Dr. Obura whose contents reveal that the documents were not provided as ordered by the Judge. Thus, on the 7th March 2008, Dr Obura was back in court again with a Notice of Motion under Order X Rule 20, Order L Rule 1 of the Civil Procedure Rules seeking orders to strike out the hospitals defence to the plaintiffs claim and to his defence. This is the application that was heard and determined by the Nambuye J., in the ruling of 18th July 2008, the subject matter of the instant appeal. In the said ruling, the hospital's defence and pleadings were struck out and the costs were awarded to Dr. Obura.

[8] Being aggrieved by the said orders, the appellant filed the instant appeal which is predicated on some 28 grounds of appeal. These grounds were ably argued together by Mr. Zul Mohamed, learned counsel for the appellant. The grounds are fairly repetitive, thus we will follow the submissions by counsel who combined the arguments so as to avoid repetition and possible proliferation of mistakes. Mr. Mohamed submitted that the learned judge erred by striking out the appellant's defence without considering the appellant had largely complied with the order for discovery; the learned judge was faulted for failing to appreciate the letters on record exchanged between counsel whereby counsel for Dr. Obura was invited to peruse the patient's file on appointment; this was an indication that counsel for the appellant was ready to give access to the original file.

[9] Counsel for the appellant went on to submit that there was a detailed affidavit by the hospital's legal officer, Judith Oduge-Otieno, which indicated that some documents were filed in court on 19th February 2008 and were served on all parties. However due to a clerical error, oversight and mix up of documents the operation record form and observation chart were missed out when the documents were photocopied and passed to the advocates. On discovery of the said error the documents were photocopied and served on the parties on 14th April 2008. According to counsel for the appellant, the documents that were filed in court contained all the information requested for by the respondents except for the post-mortem report thus the learned trial judge erred by concluding the appellants defied a court order.

[10] Counsel for the appellant also submitted that under order 10 rule 13 of the old Civil Procedure Rules, the venue of discovery must be stated so as to protect the integrity of the documents. In the instant case, the original documents could not be filed in the registry to safeguard their integrity and security. Lastly counsel urged us to consider the order striking the appellant's pleading was too drastic; he relied on a list of authorities of some of the cases appearing herebelow.

[11] Those authorities reiterate the principles that guide Courts in exercise of discretion and the overriding objectives which are predicated on the four pillars that justice should be dispensed in a proportionate, accessible, affordable and efficient manner; the cases of ;

a. **Peter Ngugi v Esther Wangari Githinji Civil Appeal No. 36 of 2014** emphasizes a right to a hearing as a fundamental right.

b. **Philip Keipto Chemwalo and Another v Augustine Kubende Civil Appeal No 103 of 1984** underscores an old adage that a mistake by an advocate should not be visited on an innocent client.

c. **Husband of Marchwood Ltd v Drummond Walker Developments Ltd (1975) 2 ALL ER 30**; the ratio decidendi is that rules are not made for punishing a party for failure to comply with them.

d. **Nicholas Kiptoo Arap Korir Salat v Independent Election and Boundaries Commission & Others Civil Appeal No. 228 of 2013**. This Court stated that a court of law has to do justice between parties without undue regard to technicalities of procedure. We shall comment on the said authorities in the course of the analysis of the submissions.

[12] This appeal was opposed by respondents' counsel, Mr. C. N Kihara for the deceased family, Mr. Nyang'au for Dr. Obura and Mr. Ngeno for Dr. Moniz. Mr Kihara referred to various correspondence that were exchanged between counsel for appellant and counsel for Dr. Obura kept on asking for documents. The appellant was also served with the notice to produce, and a copy of the said notice was attached to the affidavit in support of the application that was made in court for discovery. Thus the

application for discovery was made in court as a last resort. The order for compliance was issued on 28th September 2007. There was no compliance until 27th March 2008, almost six months later. Even when the appellants filed photocopies, key documents were left out as the appellant was reluctant to exhibit some documents. If there was an issue of confidentiality, it should only have worried the family of the deceased who died as a result of negligence by the hospital and its agents while in the theatre undergoing the operation. Mr Kihara defended the ruling of the learned judge which he submitted, it was supported by law and decided cases; counsel for the appellant did not avail the documents for perusal at a central place where their integrity would not be an issue; the judge properly exercised her discretion and as no sufficient reasons whatsoever have been given to set aside the orders we were urged to dismiss the appeal with costs.

[13] While associating himself with the above submissions by counsel for the deceased family, Mr. Nyangáu learned counsel for Dr Obura stated that it was his client who applied for production of the documents. Dr Obura took the deceased as his patient and operated on him at Aga Khan hospital and that is where all records consisting his notes, from the time of admission, the entire treatment, and nursing care until the deceased passed away were kept. The order directing the appellant to produce the said documents was clear, they were to be produced in 30 days. On 11th October 2007, counsel for Dr. Obura wrote to the appellants' counsel enclosing a copy of the court order made on the 28th September 2007; on 8th February 2008, counsel notified the appellant that photocopies served upon them left out "surgeon's operation notes'' it was indicated in the same letter that the photocopies supplied were not legible.

[14] Mr. Nyangáu submitted that it was necessary for the appellant to produce the documents as ordered, and also the original file to enable their client authenticate them; it was not easy to authenticate photocopies and due to the hostile stance taken by the appellants, they had to invoke the law to seek to strike out the defence as their client would be prejudiced by a trial without the said documents. Moreover, if the appellants' had genuine intentions to comply with the court order of 28th September 2007, and they were delayed by a good reason, they ought to have made an application before the same court seeking for extension of time by demonstrating sufficient reasons. Hence according to the respondents, the appellant cannot tell this Court that the documents which they were supposed to produce by October 2007, are available 8 years down the line. Lastly, while commenting on the application that sought to strike out the appellants defence, counsel stated that it was not defective. He drew our attention to the application for discovery especially prayer no 3 that prayed for the appellants' defence and pleadings be struck out for failure to produce.

[15] In our view this entire appeal is hinged on one issue; that is, whether the learned judge in allowing the application to strike out the defence and pleadings by the appellant, properly exercised her discretion. The guiding principles on when to interfere with the exercise of a judge's discretion are well articulated especially in the ancient and well revered decision in the case of; ***Mbogo & Another -vs- Shah*****, *(1968) E.A. 93*** at page 95, Sir Charles Newbold P. held:

> "**…..a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice…."**

[16] We also wish to emphasize that an appellate Court may only interfere with the exercise of judicial discretion if satisfied either:

> **(a) The Judge misdirected himself herself on law, or**
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> **(b) That he or she misapprehended the facts;**
>
> **(c) That he or she took account of considerations which should not have been taken an account of; or**

(d) That he or she failed to take account of some consideration which should have been taken account; or

(e) That the decision, albeit discretionary one, is plainly wrong. (See Mrao Limited vs. First American Bank of Kenya Limited & 2 Others [2003] KLR 126."

[17] We have to address the issue of whether there was justification for the learned judge to strike out the appellants' defence and pleadings. Before the learned judge was an application to strike the appellant's defence and pleadings for failure to comply with the order issued on 28th September 2007, requiring the appellant to avail or produce documents within 30 days. If the appellant complied with the said order, the documents ought to have been produced on or about the 30th October 2007. It is common ground, the appellant did not produce the documents within the time given by court and no application was made for extension of time within which to produce them. It is also common ground that certain photocopies of documents were filed and served upon the respondents but some documents mainly the surgeons notes were left out as can be seen from the replying affidavit by Judith Oduge-Otieno sworn on 20th May 2008, on behalf of the appellant, where she states;

"That during the month of October 2007 we were able to locate what is now before the court as volume 1 which was filed on the 2nd October 2007 and served on all parties concerned on that day.

That subsequently further records were located which were old, voluminous and bulky and the same were also filed and served on all parties concerned on 19th February 2008.

That by reason of some clerical error and oversight and mix up of documents at our archives the operation record form and observation chart were missed out when photocopying the records for submission to the Advocates M/S Mohamed Samnakay.

That on discovery of the said error, the said operation record form and observation chart were filled on 10th April 2008 and served on the plaintiffs advocates and the second defendants' advocates on the same day while the third defendants' advocates were served on the 14th April 2008."

[18] There is also a flurry of correspondence between counsel for Dr. Obura especially a letter dated 8th February 2008 addressed to the advocates of the appellant pointing out that the surgeon's operation notes were omitted. By a letter dated 11th February 2008, the appellant's advocates responded as follows;

"We made appropriate enquiries with our client, who has been able to dig out further records from its archives. These records are voluminous and bulky and may need some time to photocopy and bind. If you are in a hurry to get these, please arrange for your representative to call upon us so that we may release one copy of entire records on urgent basis upon your written undertaking to pay us the copying and binding costs

Our clients state that non delivery of these further records was inadvertent and not intended to disobey the court order.''

[19] By the appellants own admission, they omitted vital documents and they were not remorseful at all for failure on their part to comply with a court order and this explains why they did not deem it necessary to seek extension of time to file them. It was brought to the appellant's notice even as late 4th March 2008 that the operation notes missing from the bundle of documents. The appellant did not avail this vital document and hence the respondents had no choice but to return to court under the provisions of **Order X Rule 20** of the old Civil Procedure Rules which provides;

"**Where any party fails to comply with any order to answer interrogatories, or for discovery**

or inspection of documents he shall, if the plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect, and an order may be made accordingly"

[20] The ruling appealed against clearly identified the pertinent issues that the judge considered before arriving at the conclusion that the appellant's defence should be dismissed. We think it is important to reproduce them verbatim;

(1) "Indeed the second defendant moved this court by way of notice of motion dated 22nd august 2007 seeking discovery before trial.

(2) Indeed one of the prayers sought was that patients file containing the surgeon, anaesthetics and nurses notes be produced in court for perusal by the 2nd defendant that it be authenticated by him and he be allowed to take copies of the said file.

(3) Indeed at no time has such a file been produced in court, perused, authenticated and photocopied.

(4) Indeed the 1st defendant has filed copies of certain documents purporting them to be those required by the 2nd defendant.

(5) That these documents have been accompanied by a replying affidavit as well as a supplementary replying affidavit.

(6) That the said replying affidavit as well as the supplementary replying affidavit has not responded to the applicants deponement in paragraph 5 of the supporting affidavit to the effect that the bundle of documents exhibited do not contain the detailed notes he made and which were supposed to be contained in the patients file.

(7) There is also no firm averment on the part of the said replying and supplementary replying affidavit as to whether all the documentation produced as the photocopies form the content of the record of the patient's file.

(8) There is also no deponement as to why the original patient's file has not been produced and availed to court as ordered by the court."

[21] Having made the above factual findings, the learned judge proceeded to conclude that the appellant simply disregarded a court order and there was no justification for them to do so. If the appellant's had any difficulty in complying with a particular order as argued in this appeal that the original file could not be released to the court registry for security and integrity issues, (namely the same could disappear or documents could be tampered with;) if this was a valid reason, that prevented the appellant from complying with the order, the rational thing for them to do was to mention the matter before the Judge or even before the deputy registrar for purposes of complying with the court order. Like the learned trial judge, we are not persuaded that the appellant complied with the order of discovery which was clear and unambiguous.

[22] It was also submitted very rigorously by counsel for the appellant that the appellant was denied a right to a hearing; the mistake of counsel should not have been visited upon an innocent client; the rules of procedure are not made for punishing a party for failure to comply with them. We agree a right to a hearing is a fundamental right under our constitution. See **Richard Ncharpi Leiyagu –vs- Independent Electoral and Boundaries Commission & 2 Others,** CA No. 18 of 2013, Nyeri.

"The right to a hearing has always been a well-protected one in our Constitution and is also

the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there would be proportionality."

The appellant was heard in this application, the fact that the orders were not in its favour does not amount to a no hearing. The appellant wilfully disregarded a court order and adopted a near hostile, confrontational and non- co-operative attitude towards that order of discovery.

[23] The 1st respondent followed the law on discovery to the letter and successfully applied to strike out the appellants defence and pleadings. We think it is now too late for the appellant to cry foul that it was not given a hearing because they squandered the opportunity availed to them which was simply to comply with an order for discovery so as to get to the trial of the matter. The learned trial judge posited and rightly so, that it was not possible for the 2nd respondent to conduct a trial without vital documents to his defence which were in the custody of the appellant. Counsel for the appellant in his submissions stated that the documents are now available and they could be produced in original form any time, we are of the view it is now too late in the day; the horses bolted and left the stable as it is almost 8 years later; those documents were required in October 2008 and not in 2015.We have not seen any mistake in this matter that can be attributed to counsel. All along it is the appellant who failed to avail the documents and we agree with the learned judge the appellant should bear the consequences arising from their own inefficient filing system.

[24] Lastly before we dismiss this appeal as we are bound to, we wish to comment on the submission by counsel for the appellant that rules of procedure should not be used to punish the appellant for its failure to comply. The chronological order of matters culminating in the eventual order striking the appellants defence and pleadings does not portray the appellant as a victim of procedure but a party who wilfully disobeys a court order and then seeks to benefit from its own disobedience. The facts in the case of; **EASTERN RADIO SERVICE v TINY TOTS [1967] EA 392** are different from this case as it was principally held that the judge lacked jurisdiction to re- open a matter for discovery of documents. This was because the matter had been referred back to the high court by the Court of Appeal only for assessment of damages. Indeed the holding that is highlighted supports the position we have taken in this appeal that a party who wilfully disregards or fails to comply with the order of discovery can be precluded from pursing its claim.

"A litigant who has failed to comply with an order for discovery should not be precluded from pursuing his claim and setting up his defence unless his failure to comply was due to a wilful disregard of the order of the court."

[25] The upshot is that we find this appeal lacking in merit, consequently it is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 12th day of February, 2016.

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

…….....…….

JUDGE OF APPEAL

G.B.M KARIUKI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR